

E-Filed 11/17/2009

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

ROBERT PRITIKIN, et al.,

Plaintiffs,

V.

COMERICA BANK, et al.,

Defendants.

Case Number C 09-03303 JF (RS)

**ORDER GRANTING MOTION TO
DISMISS WITH LEAVE TO
AMEND**

Re: Docket Nos. 11, 16, 20

I. BACKGROUND

Plaintiffs, a group of sixty-four investors, filed the instant action on July 20, 2009, alleging claims for aiding and abetting a breach of fiduciary duty; aiding and abetting fraud; violation of California’s Unfair Competition Law, Cal. Bus & Prof. Code § 17200 et. seq.; violation of the Racketeer Influence and Corrupt Organizations Act (“RICO”) 18 U.S.C. § 1961(1)(c)(d); and civil conspiracy to breach a fiduciary duty against Defendants Comerica Bank, et al. (“Comerica”). On August 28, 2009, Comerica moved to dismiss the action pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiffs oppose the motion.¹ For the reasons set forth below, the motion

¹ On October 8, 2009, Plaintiffs moved to strike the Declaration of Monique Jewett-Brewster submitted by Comerica in support of its motion to dismiss. On October 26, 2009, Plaintiffs moved to strike a portion of Comerica's brief in reply to Plaintiffs' opposition.

1 will be granted with leave to amend.

2 The relevant allegations of the complaint, which are assumed to be true for purposes of
 3 Comerica's motion, are as follows. From December 1999 through approximately October 2002,
 4 ("the loss period"), Plaintiffs invested in Four Star Financial Services, LLC ("Four Star").
 5 Complaint ¶ 9. Four Star was managed by Ron Anson, Jack Garrett, and Mark Cohn ("the
 6 Managers"). *Id.* ¶ 8. Although Four Star in fact was insolvent and unable to pay the millions of
 7 dollars it owed in creditor claims, the Managers were able to convince Plaintiffs that Four Star
 8 was profitable and safe for investments. *Id.* ¶¶ 11, 13.

9 One way Four Star convinced Plaintiffs that it was financially strong and making good
 10 investments was by paying regular monthly distributions to its investors. *Id.* ¶ 45. When the
 11 Managers stopped making distributions to Plaintiffs in October 2002, Plaintiffs "immediately
 12 suspected that Four Star was in financial trouble and stopped making new investments." *Id.* ¶ 14.
 13 As a result, the Managers' "Ponzi" scheme collapsed, and in October 2003, Four Star was put
 14 into involuntary bankruptcy. *Id.* ¶¶ 14, 15. The Managers were the subject of a criminal
 15 investigation, and Cohn was sentenced to a five-year federal prison term for his role in a Four
 16 Star credit card scheme. *Id.* ¶ 54.

17 Plaintiffs claim that they first learned about Comerica's role in the Ponzi scheme in
 18 October 2008, when Cohn spoke publicly about a "banking scheme" between Four Star and
 19 Comerica. *Id.* ¶ 55. According to Plaintiffs, Comerica began its participation in the scheme not
 20 later than mid-1999, when Richard Smith ("Smith"), then a vice-president of Comerica, issued a
 21 multi-million dollar line of credit to Anson and Garrett. *Id.* ¶ 19. Anson and Garrett were
 22 Smith's personal accountants. *Id.* ¶ 20. The alleged banking scheme is complex in nature, but it
 23 generally involved Comerica knowingly assisting Four Star in moving funds quickly from Four
 24 Star's accounts to clear monthly distribution checks to investors while concealing money from
 25 creditors. *Id.* ¶ 33.

26
 27 Because the documents in question do not affect the disposition of the motion to dismiss, the
 28 motions to strike will be terminated as moot.

1 During the loss period, Plaintiffs collectively invested more than \$50 million in Four Star.
 2 *Id.* ¶ 10. Plaintiffs allege that “upon information and belief...Comerica and Smith purposely
 3 concealed their material and knowing assistance [of]...Four Star Managers’ fraud and breach of
 4 fiduciary duty to Plaintiffs and other investors of Four Star.” *Id.* ¶ 51. Plaintiffs claim that “it
 5 would have been impossible for Plaintiffs to have discovered or suspected the existence of the
 6 Banking Scheme or Comerica’s...involvement in the Banking Scheme, or the Ponzi Scheme” and
 7 that there were “no publicly-available documents Plaintiffs could have accessed in the exercise of
 8 reasonable diligence that would have disclosed or implied such participation or involvement, or
 9 the existence of the Banking Scheme.” *Id.* Plaintiffs also allege upon information and belief that
 10 prior to the filing of the instant action, for fear of possible self-incrimination, Anson and Garrett
 11 “were unwilling to cooperate with any investigations or inquiries into the operation of Four Star,
 12 including without limitation investigations by the trustee of the Four Star bankruptcy estate and
 13 others in connection with the Four Star bankruptcy on the ground.” *Id.* ¶ 53.

14 The Court takes judicial notice that between the end of the loss period and Cohn’s public
 15 disclosure of the alleged Banking Scheme, a number of lawsuits were filed against Four Star by
 16 former investors. Comerica Requests for Judicial Notice (“RJN”) Exs. 4-9, 13, 17. Several of
 17 the plaintiffs in these suits are named Plaintiffs herein. On August 4, 2003, Plaintiff Steve
 18 Gevirtz filed suit against Anson, Garrett, and Four Star alleging multiple claims related to the
 19 scheme at issue in this case. RJN Exs. 5, 26. On October 14, 2003 Plaintiffs Jon Ferrara, Arlene
 20 Ferrara, and The Ferrara Family Trust filed suit alleging losses resulting from investments in
 21 Four Star. RJN Ex. 9. On February 13, 2004, Plaintiffs Phyllis Klein, Kenneth L. Krause, Perry
 22 Gibson, and the Krause/Gibson Revocable Trust retained counsel and filed a class action against
 23 Cohn, Garrett, Anson, and others making multiple claims regarding the same alleged scheme at
 24 issue here. RJN Ex. 13. On May 24, 2004, Plaintiffs Phyllis Klein, the Phyllis Klein Trust,
 25 Kenneth Krause, Perry Gibson, and the Krause/Gibson Revocable Trust amended their class
 26 action suit to name two of Four Star’s banks as defendants. The amended complaint in that
 27 action alleges, among other things, that the banks aided and abetted the Four Star Ponzi scheme
 28 by financing Four Star’s operations through lines of credit to Anson and Garrett, and by

1 “shuffling funds” among accounts held by Four Star entities. RJD Ex. 17, ¶¶ 63, 86, 92. In or
 2 about March 2004, a public website called “FourStarFraud.com,” was created to provide
 3 summaries of judicial proceedings in federal, bankruptcy, and state courts. RJD Ex. 22.

4 II. LEGAL STANDARD

5 A complaint may be dismissed for failure to state a claim upon which relief may be
 6 granted if a plaintiff fails to proffer “enough facts to state a claim to relief that is plausible on its
 7 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Allegations of material fact must
 8 be taken as true and construed in the light most favorable to the nonmoving party. *Pareto v.*
 9 *FDIC*, 139 F.3d 696, 699 (9th Cir. 1998), *see also Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336,
 10 337-38 (9th Cir. 1997). However, the Court need not accept as true allegations that are
 11 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
 12 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *see also Twombly*, 550 U.S. at 561 (“a wholly
 13 conclusory statement of [a] claim” will not survive motion to dismiss). Leave to amend should
 14 be granted unless it is clear that the complaint’s deficiencies cannot be cured by amendment.
 15 *Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995).

16 III. DISCUSSION

17 A. Documents considered

18 “On a motion to dismiss a court may properly look beyond the complaint to matters of
 19 public record and doing so does not convert a Rule 12(b)(6) motion to one for summary
 20 judgment.” *Thomas v. Walt Disney Co.*, No. 08-15602, 2009 WL 2011388 at *1 (9th Cir. 2009),
 21 quoting *Mack v. South Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Comerica
 22 makes numerous requests for judicial notice, all of which pertain to documents of public record.
 23 *See* RJD Exs. 1-26. The majority of the documents are court records of complaints and
 24 supporting documents filed against Four Star and affiliated parties concerning Four Star’s
 25 financial dealings and the Ponzi scheme alleged in the instant complaint. RJD Exs. 2-3, 4-9, 13,
 26 15, 17, 21, 24, 26. The remaining requests for judicial notice include court filings related to Four
 27 Star’s bankruptcy, RJD Exs. 1, 10-12, 14, 16, 19, 20, 23, 25, an article from the *Wall Street*
 28 *Journal* about Four Star investments, RJD Ex. 18, and a screenshot of FourStarFraud.com, RJD

1 Ex. 22.

2 Plaintiffs contend that the exhibits are irrelevant to the instant proceedings because
 3 Plaintiffs had no obligation to investigate public records for evidence of Comerica's misconduct
 4 and because even if there were such an obligation the exhibits contain no facts indicating that
 5 Plaintiffs might have claims against Comerica. However, as argued by Comerica, each of the
 6 documents was in the public domain within the six-year time period between Plaintiffs' injury
 7 and the date Plaintiffs filed the instant action. As noted above, some of the documents are from
 8 lawsuits by named Plaintiffs in the instant case against Four Star and related affiliates, including
 9 banks allegedly involved in activity similar to that alleged in the instant complaint. These
 10 documents are directly relevant in determining whether Plaintiffs' claims against Comerica are
 11 barred by the applicable statute of limitations or are subject to equitable tolling, the discovery
 12 rule, or equitable estoppel. Among other things, Comerica points out that it was named in Four
 13 Star's bankruptcy filings as a bank with which Four Star had a commercial relationship. *See e.g.*
 14 RJN Ex. 11 at 2. Accordingly, the request for judicial notice will be granted.²

15 **B. Federal Subject-Matter Jurisdiction**

16 Only one of Plaintiffs' claims for relief – their RICO claim – presents a federal question.
 17 Section 107 of the Private Securities Litigation Reform Act ("PSLRA") (the "RICO
 18 amendment"), adopted in 1995, eliminated securities fraud as a predicate act upon which a RICO
 19 claim may be based. *See* 18 U.S.C. § 1964(c) (providing that "no person may rely upon any
 20 conduct that would have been actionable as fraud in the purchase or sale of securities to establish
 21 a violation of section 1962"); *Trachsel v. Bucholz*, No. C-08-02248 RMW, 2009 WL 86698 at *3
 22 (N.D. Cal. Jan. 9, 2009) (holding that the PSLRA eliminated securities fraud as a predicate act
 23 upon which a RICO claim could be based). Plaintiffs argue nonetheless that their RICO claim

25 ² The Court also will take judicial notice of the House Conference Committee Report on
 26 the Private Securities Litigation Reform Act of 1995 ("PSLRA"), H.R. Conf. Rep. No. 104-369
 27 (1995). Plaintiffs' Unopposed Request for Judicial Notice (P. RJN) Ex. A; *Thomas*, 2009 WL
 28 2011388 at *1 (holding that judicial notice of a public record is proper within the context of a
 motion to dismiss).

falls outside the scope of the amendment. They contend that the amendment was meant to protect securities fraud *defendants*, not securities fraud *conduct*, from the “unnecessary and unfair” threat of treble damages and other extraordinary remedies provided by RICO” (H.R. Conf. Rep. No. 104-369 (1995) at 47), and they point out that their aiding and abetting claims against Comerica may not be maintained under the PSLRA itself. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) (holding that the private right of action implied in the securities laws does not extend to aiders and abettors).

The Ninth Circuit has yet to address this question directly. However, in *Howard v. America Online Inc.*, 208 F.3d 741 (9th Cir. 2000), *cert. denied*, 531 U.S. 828, 121 S.Ct. 77 (2000), the court concluded that, despite the fact that plaintiffs lacked standing to assert a securities fraud claim, the RICO amendment still applied because the predicate act itself was conduct actionable under section 1962. *Id.* at 749-50.

The United States District Court for the Southern District of New York has held that, “even were [this] Court to conclude that [defendant’s] conduct merely constituted unactionable aiding and abetting...[the] Amended Complaint still relies extensively on...fraud to establish [defendant’s] liability under RICO’ and therefore falls squarely within the scope of the PSLRA bar.” *Thomas H. Lee Equity Fund V, L.P. v. Mayer Brown, Rowe & Maw LLP*, 612 F.Supp.2d 267, 281 (S.D.N.Y. 2009), quoting *Fezzani v. Bear, Stearns & Co.*, No. 99 Civ. 0793, 2005 WL 500377, at *4 (S.D.N.Y. Mar 2, 2005). The court’s reasoning is persuasive here. Plaintiffs’ alleged injury arises entirely from Comerica’s alleged aiding and abetting of Four Star’s underlying securities fraud scheme. “The language of the statute simply does not require that, for a RICO claim to be barred, the plaintiff who sues under RICO must be able to sue under securities laws, or that the conduct ‘actionable as securities fraud’ on which the plaintiff relies to establish the RICO violation must be that of the defendant.” *Id.* at 281-282.

The holding in *Thomas H. Lee Equity Fund V* is amply supported by the legislative history surrounding the RICO Amendment. As the court observed, “the amendment barring RICO claims was made in the same statute that explicitly dealt with the Supreme Court’s decision in *Central Bank* by authorizing only the SEC-not private parties-to bring enforcement

1 actions against aiders and abettors. *Id.* at 282, citing PSLRA, Pub.L. No. 104-67, § 104, 109
 2 Stat. 737, 757, codified in 15 U.S.C. § 78t(f). The court also noted that:

3 It would be strange indeed if Congress, in a statute that otherwise bars private
 4 causes of action under RICO for predicate acts that describe conduct actionable as
 5 securities fraud, nevertheless chose to allow enhanced RICO remedies-treble
 6 damages and attorneys' fees-against *only* the very parties that Congress
 7 simultaneously made immune from private suit under the securities laws. The
 better interpretation-and the one supported by the plain meaning of § 107-is that
 the RICO Amendment bars claims based on conduct that could be actionable
 under the securities laws even when the plaintiff, himself, cannot bring a cause of
 action under the securities laws. *Id.* at 282-83.³

8 C. Supplemental jurisdiction

9 While federal courts may exercise supplemental jurisdiction over state-law claims "that
 10 are so related to claims in the action within [the court's] original jurisdiction that they form part
 11 of the same case or controversy under Article III of the United States Constitution," 28 U.S.C. §
 12 1367(a), a court may decline to exercise supplemental jurisdiction where it "has dismissed all
 13 claims over which it has original jurisdiction," id. § 1367(c)(3). Indeed, unless "considerations of
 14 judicial economy, convenience[,] and fairness to litigants" weigh in favor of the exercise of
 15 supplemental jurisdiction, "a federal court should hesitate to exercise jurisdiction over state
 16 claims." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *see also Carnegie-Mellon*
 17 *Univ. v. Cohill*, 484 U.S. 343, 350 (1988) ("[A] federal court should consider and weigh in each
 18 case, and at every stage of the litigation, the values of judicial economy, convenience, fairness,
 19 and comity."). Because it remains unclear whether Plaintiffs can state a viable federal claim, the
 20 Court will defer its review of the remaining state-law claims against all Defendants. The Court
 21 notes however, that as to some or all of those claims, Plaintiffs may have difficulty escaping the
 22 bar of the statute of limitations.

23
 24 ³ Plaintiffs rely upon a conflicting Southern District decision in *OSRecovery, Inc. v. One*
 25 *Groupe Intern.*, Inc., 354 F.Supp.2d 357, 369-71 (S.D.N.Y. 2005), a case in which the court held
 26 that aiding and abetting securities fraud could serve as the basis of a RICO claim because it was
 27 not otherwise actionable. However, no district court within the Ninth Circuit has followed this
 28 authority, which as discussed above appears to be logically inconsistent with *Howard*. *See also* *Thomas H. Lee Equity Fund V*, 612 F.Supp.2d at 281 (concluding that *OSRecovery, Inc.*'s
 "approach is both unpersuasive and against the great weight of precedent").

1
2 **IV. ORDER**
3
4

5 Good cause therefor appearing, the motion to dismiss is GRANTED with leave to amend.
6 Any amended complaint shall be filed within thirty (30) days of the date this order is filed.
7
8

9 IT IS SO ORDERED.
10
11

12 DATED: November 17, 2009
13
14

15 
16 JEREMY FOEGE
17 United States District Judge
18
19
20
21
22
23
24
25
26
27
28

1 This Order was served on the following persons:

2
3 Joseph Camenzind , IV camenzindlaw@yahoo.com

4
5 Richard C. Darwin rdarwin@buchalter.com, clauren@buchalter.com,
hbennett@buchalter.com, lgerace@buchalter.com

6
7 Robert M. Lubin r1817@aol.com, hcolive@aol.com

8 Kenneth Pritikin
9 Law Offices of Kenneth Pritikin
2950 Buskirk Avenue
10 Suite 300
Walnut Creek, CA 9459